

University of St. Thomas Law Journal

Volume 16

Issue 3 *Clemency: A Constitutional Power
Moves into the Future*

Article 7

March 2020

Requiring the Bare Minimum: A Legislative Proposal for Congress to Use Dole Funding Incentives to Establish a Minimum Education and Training Requirement for Citizens Who Wish to Carry Concealed Firearms

Josh Matushin

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Legislation Commons](#), [Other Law Commons](#), and the [Second Amendment Commons](#)

Recommended Citation

Josh Matushin, *Requiring the Bare Minimum: A Legislative Proposal for Congress to Use Dole Funding Incentives to Establish a Minimum Education and Training Requirement for Citizens Who Wish to Carry Concealed Firearms*, 16 U. ST. THOMAS L.J. 447 (2020).

Available at: <https://ir.stthomas.edu/ustlj/vol16/iss3/7>

This Note is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

NOTE

**REQUIRING THE BARE MINIMUM:
A LEGISLATIVE PROPOSAL FOR
CONGRESS TO USE DOLE FUNDING
INCENTIVES TO ESTABLISH A
MINIMUM EDUCATION AND TRAINING
REQUIREMENT FOR CITIZENS WHO WISH
TO CARRY CONCEALED FIREARMS**

JOSH MATUSHIN*

I. INTRODUCTION	449
II. MANY STATES ALLOW UNTRAINED, UNEDUCATED CIVILIANS TO CARRY A CONCEALED FIREARM, WHICH ENDANGERS CIVILIAN LIVES AND INCREASES THE RISK OF IMPROPER GUN USE AND EMERGENCY RESPONSE	451
A. Many States Do Not Require Firearm Education or Training, and Among Those That Do, There Is No Standardized Format or Requirement	451
B. Firearm Training and Education Can Improve General Firearm Safety, Decrease Improper Defensive Gun Usage, Better Prepare Defensive Shooters for Engagements, and Reduce Deadly Interactions with Law Enforcement	453
1. Proper Firearm Training and Education Can Reduce the Risk of Accidental Shootings and Injuries	454
2. Education on Self-Defense Law and Firearm Use Can Reduce the Number of Illegitimate Defensive Gun Uses	455
3. Self-Defense Education Ensures That Citizens Carrying Concealed Weapons Understand How to Act during a Defensive Gun Use.....	456

* J.D. Candidate 2020, University of St. Thomas School of Law.

4. Firearm Training and Education Reduces the Risk Civilians Carrying a Concealed Firearm and Officers Face When Interacting with Each Other . . .	458
III. CONGRESS SHOULD INCENTIVIZE STATES TO ADOPT A FEDERALLY ESTABLISHED MINIMUM EDUCATION AND TRAINING REQUIREMENT THROUGH THE SPENDING CLAUSE . .	460
A. Federally Mandating a Minimum Training Requirement Will Violate the Anticommandeering Precedents of the Tenth Amendment	461
B. Congress Should Use Its Spending Power to Incentivize States to Adopt the Proposal by Withholding Grant Funding from Noncompliant States	464
1. Establishing Minimum Training and Education Requirements Serves the “General Welfare”	465
2. The CFETS Act Is Unambiguous in the Condition It Sets on States to Receive the Conditional Grants	466
3. The CFETS Act Relates to the Expenditure of Funds Because State and Local Law Enforcement Are Affected by Concealed-Firearm Carriers	466
4. The Proposal Is Not Coercive Because It Does Not Limit Funding Unreasonably	469
5. The Proposed Training and Education Requirements Are Not Themselves Unconstitutional Because They Are Allowable under the Second Amendment	470
IV. THE CFETS ACT IS SUPPORTED BY THE TEXT OF THE SECOND AMENDMENT	470
A. The CFETS Act Passes Each Part of the Two-Part Second Amendment Constitutionality Test	472
1. The CFETS Act Affects “Longstanding Prohibitions” and Does Not Restrict the Core Protections of the Second Amendment	472
2. The CFETS Act Passes Intermediate Scrutiny and Is Constitutional under the Second Amendment	475
B. The CFETS Promotes the Textual Meaning of the Second Amendment	477
V. THE ARGUMENTS AGAINST A FEDERALLY ESTABLISHED MINIMUM EDUCATION AND TRAINING REQUIREMENT	479
A. Placing the Cost of Training and Education on the States Does Not Create an Unnecessary Financial Burden	479
B. The CFETS Act Does Not Put an Unnecessary Restriction on Those Wanting to Protect Themselves . . .	480

C. Passing the Proposed Legislation Will Not Lead to Increased Firearm Regulations 481

VI. CONCLUSION 483

APPENDIX A: PROPOSED LEGISLATION 484

I. INTRODUCTION

South Dakota Governor Kristi Noem signed Senate Bill 47 on January 31, 2019.¹ The bill, which went into effect on July 1, 2019, permits South Dakota residents to carry concealed handguns without a concealed carry permit (also known as a “CCW permit”) or any formal training or educational requirements.² “Concealed carry,” or carrying a concealed firearm, occurs when a citizen carries a firearm under his or her clothes in public. Concealed carry is legal in all states, but most require their citizens to apply for a state-issued CCW permit to legally carry concealed firearms. South Dakota is no longer one of those states.

Unfortunately, this legislation is not an isolated incident. A growing number of states across the United States are implementing or have implemented statutes allowing firearm owners to carry concealed weapons without any education or training.³ While associations such as the National Rifle Association (NRA) applaud the deregulation of concealed carry,⁴ allowing individuals to carry concealed firearms without training and education is often considered dangerous.⁵ It increases the likelihood of a citizen using his or her firearm at the wrong time and without a full understanding of what to do during and after a self-defense shooting.⁶

This note proposes legislation meant to ensure that citizens who wish to carry concealed weapons understand their legal obligations and have the

1. S.B. 47, 2019 Leg., 94th Sess. (S.D. 2019).

2. Joe Sterling, *South Dakota Is the Latest State to Allow Concealed Handguns to Be Carried Without a Permit*, CNN (Feb. 1, 2019, 4:42 PM), <https://www.cnn.com/2019/02/01/us/sd-concealed-carry-law-trnd/index.html>; for the text of Senate Bill 47; see S.B. 47, 2019 Leg., 94th Sess. (S.D. 2019); NRA, *South Dakota: Constitutional/Permitless Carry Law Goes into Effect Today*, NRA-ILA (July 1, 2019), <https://www.nraila.org/articles/20190701/south-dakota-constitutional-permitless-carry-law-goes-into-effect-today>.

3. Sterling, *supra* note 2; *Map of Concealed Carry Laws in the U.S.*, HNI (Mar. 24, 2019), <https://www.hni.com/concealed-carry-resources-for-employers/concealed-carry-animated-map>.

4. Morgan Gstalter, *South Dakota Governor Signs Law to Allow Concealed Handguns Without a Permit*, HILL (Jan. 31, 2019, 4:38 PM), <https://thehill.com/homenews/state-watch/427930-south-dakota-governor-signs-law-allowing-concealed-handguns-without-a>; Stephen Gruber-Miller, *You Wouldn’t Need a Permit to Carry a Gun in Iowa Under This Proposal*, DES MOINES REG. (Feb. 11, 2019, 6:44 PM), <https://www.desmoinesregister.com/story/news/politics/2019/02/11/guns-iowa-legislature-permitless-carry-owners-proposal-nra-firearms-coalition-permits-firearm-permit/2838973002> (quoting Scott Jones, a lobbyist for the NRA, supporting an Iowan bill for permitless carry).

5. Jack Brammer, *‘Dangerous’ or ‘Common Sense’? NRA Pushes Bill to Allow Concealed Guns with No Permit*, LEXINGTON HERALD LEADER (Feb. 13, 2019, 12:38 PM), <https://www.kentucky.com/news/politics-government/article226147750.html>.

6. *Infra* Section II, Part B.

technical training to properly, ethically, and competently defend themselves and others. Firearm sales have increased over the last two decades,⁷ with spikes after most mass shooting events in the United States.⁸ The increase of mass shooting events⁹ coupled with the increase of firearms in the public underlines the importance of having citizens who carry concealed firearms be aware of their legal, moral, and technical duties in these dangerous, high-stress situations. A population that understands how to handle life-threatening encounters, such as mass shootings or one-on-one confrontations, and how to best address those situations—whether to run or to engage—is in the interest of everyone.

Therefore, the United States Congress should pass this note's proposed legislation, which restricts federal grants to states' law enforcement officers unless those states implement a federally established minimum training and education requirement for citizens who wish to carry concealed firearms. Section II of this note underlines the need for training and education for individuals who wish to carry concealed weapons. Section III proposes the model legislation, the Citizen's Firearm Education and Training Safety Act, and establishes why using federal grant restrictions to incentivize state adoption of the policy is the best model for implementing the proposal. Rather than mandating a concealed carry training requirement for every state, structuring the proposed legislation around the method scrutinized in *South Dakota v. Dole*¹⁰—utilizing congressional spending power to incentivize state action—is less likely to be successfully challenged. Section IV explains why the proposed legislation not only survives Second Amendment scrutiny but is actually directly supported by the Second Amendment's text. Finally, Section V answers the expected arguments against implementing federal firearms regulations.

7. Jack Beckwith & Michael Hester, *A Look at Gun Sales by State: How U.S. Gun Statistics Have Changed Since 1999*, DATAFACE (Mar. 2, 2018), <http://thedataface.com/2018/03/economy/us-gun-sales>.

8. Gayathri Anuradha, *Why Do Gun Sales in the US Spike After Mass Shootings?*, INT'L BUS. TIMES (Oct. 28, 2017, 7:00 AM), <https://www.ibtimes.com/why-do-gun-sales-us-spike-after-mass-shootings-2607059>.

9. Bonnie Berkowitz et al., *The Terrible Numbers That Grow with Each Mass Shooting*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?noredirect=on&utm_term=.540d5fff9efa. Note, however, that firearm homicides in the United States have dropped substantially since 1993. *Gun Violence in America*, NAT'L INST. OF JUST. (Feb. 26, 2019), <https://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx>.

10. *South Dakota v. Dole*, 483 U.S. 203 (1987).

II. MANY STATES ALLOW UNTRAINED, UNEDUCATED CIVILIANS TO
CARRY A CONCEALED FIREARM, WHICH ENDANGERS CIVILIAN
LIVES AND INCREASES THE RISK OF IMPROPER GUN
USE AND EMERGENCY RESPONSE

A. *Many States Do Not Require Firearm Education or Training, and
Among Those That Do, There Is No Standardized Format or
Requirement*

Currently, each state has discretion over its concealed carry laws, such as whether the state requires a permit to carry a concealed firearm at all. States that require a state-issued permit are categorized as either “Shall Issue” or “May Issue.”¹¹ States that do not require a permit are categorized as “Permitless Carry.”¹²

This note’s proposed legislation predominantly affects those states that have permitless carry (also known as “Constitutional Carry” or “Unrestricted Carry”) policies in place. Permitless carry means that no CCW permit is required, and thus no formal application, training, or education is required to carry a concealed handgun in that state.¹³ Sixteen states have some form of permitless carry provision in place, either for anyone currently within the state or for residents of the state only.¹⁴ Several states have become permitless carry states within the past five years, showing an increasing trend of states becoming permitless carry jurisdictions.¹⁵ Eight of these states have populations where gun ownership is above the national average.¹⁶ However, none of these permitless carry jurisdictions require any education or training to carry a concealed firearm. South Dakota and Ken-

11. *Concealed Carry Permit Information by State*, USA CARRY, https://www.usacarry.com/concealed_carry_permit_information.html (last visited Apr. 10, 2019). The difference between “May Issue” and “Shall Issue” is whether the official issuing the permit has discretion to deny the citizen a permit or not. “May Issue” states give the permitting authorities more options for not issuing the permit, based on factors outside of the state’s statutes or official requirements, such as an applicant’s moral character or showing a “need” to carry a concealed firearm. *Concealed Carry*, GIFFORDS LAW CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry> (last visited Apr. 9, 2019).

12. See USA CARRY, *supra* note 11. Note that there is a fourth category, “Right Denied,” which means that no person shall carry a concealed firearm in the jurisdiction. Strictly speaking, there are no states categorized as “Right Denied,” but it is upheld in the jurisdictions of American Samoa and the N. Mariana Islands.

13. See Gruber-Miller, *supra* note 4.

14. HNI, *supra* note 3; C. Mitchell Shaw, *Constitutional Carry Gaining Ground: Kentucky 16th State to Allow Permitless Concealed Carry*, NEW AM. (Mar. 13, 2019), <https://www.thenewamerican.com/usnews/constitution/item/31734-constitutional-carry-gaining-ground-kentucky-16th-state-to-allow-permitless-concealed-carry>.

15. HNI, *supra* note 3.

16. Thomas C. Frohlich & Samuel Stebbins, *12 States Where Anyone Can Carry a Concealed Weapon*, YAHOO! FIN. (July 18, 2017), <https://finance.yahoo.com/news/12-states-where-anyone-carry-191149093.html>.

tucky joined their ranks in 2019.¹⁷ Ohio is currently considering implementing permitless carry in 2019.¹⁸ These states represent the growing gap between increasing concealed carry and decreasing legal and technical education about firearm ownership and self-defense.

However, permitless carry states are not the only states that lack formal education and training requirements. Several states with CCW permit requirements do not require either substantive shooting range or classroom training to obtain the permit.¹⁹ Furthermore, while several states do have minimum requirement statutes for applicants' legal and technical education on self-defense and firearm use, these statutes can be vague.²⁰ The length of the CCW certification program is often not statutorily designated, so long as the certification course is taught by a "certified instructor."²¹ The certification courses themselves can vary wildly in length and depth—the length of a course can range anywhere from ninety minutes to sixteen hours.²² The courses can even fluctuate within a single state; in Minnesota, one possible certification course lasts half as long as another.²³ Both courses grant certification, but the question of why one course is twice as long as the other is

17. Gstalter, *supra* note 4; Matthew Glowicki & Kala Kachmar, *Kentucky's New Concealed Carry Law: Here's What You Should Know*, COURIER J. (Mar. 17, 2019, 5:43 PM), <https://www.courier-journal.com/story/news/politics/ky-legislature/2019/03/12/what-know-new-kentucky-concealed-carry-law/3141601002>.

18. Kevin Freeman, *Ohio Lawmakers Propose Bill to Let Residents Carry Concealed Weapon Without Permit*, FOX 8 CLEVELAND (Mar. 28, 2019, 10:19 PM), <https://fox8.com/2019/03/28/bill-in-ohio-would-allow-residents-to-carry-concealed-weapon-without-a-permit>.

19. Jennifer Mascia, *26 States Will Let You Carry a Concealed Gun Without Making Sure You Know How to Shoot One*, TRACE (Apr. 17, 2017, 11:37 AM), <https://www.thetrace.org/2016/02/live-fire-training-not-mandatory-concealed-carry-permits>.

20. Minnesota's concealed carry statute is an example of vague requirements. *See* MINN. STAT. § 624.714 (2018). The statute has specific training and education requirements but gives little indication of what constitutes "an actual shooting qualification exercise" or "fundamental legal aspects of pistol possession, carry, and use." Each training course can be significantly different in depth given the openness of the statute.

21. *Id.*

22. For a comparison on how much concealed carry classes can vary, one possible California CCW certification course runs for two days and has substantial legal education and range time, whereas the Minnesota CCW certification counterpart can take only four hours. A course that qualifies a citizen to carry in several states, such as Virginia and Idaho, takes only ninety minutes and is completely online. The California course: *CCW California Concealed Carry Weapon 2 Day Course*, FIREARMS TRAINING ASSOCS., <https://www.ftatv.com/ccw-california-concealed-carry-weapon-2-day-course> (last visited Mar. 1, 2020). The Minnesota course: *Minnesota Multi-State Permit to Carry Class*, MN FIREARMS TRAINING, <https://www.mnfirearms.com/mn-conceal-and-carry> (last visited Mar. 1, 2020). The online course: *Concealed Carry Training Online*, AM. FIREARMS TRAINING, <https://www.concealedcarryonline.com/courses> (last visited Mar. 1, 2020).

23. Compare the training course for Minnesota, *supra* note 22, with a course offered in the same state, here: *MN Permit to Carry Classes*, OSSEO GUN CLUB & PRO SHOP, <https://www.osseogunclub.com/mn-permit-to-carry-class.html> (last visited Apr. 9, 2019) (for more detail on the CCW Permit class, click on the "MN Permit to Carry Class Brochure" button). One class is three hours long; the other is five hours long. Either one class is providing less educational information or range practice than the other, or one is conducted in a seriously inefficient manner. In either case, it is up to the citizen to decide which to attend, meaning different citizens in the same state and even the same city can receive substantially different concealed carry training.

unanswered. Whether the longer course teaches more, or has a harder shooting examination, is unknown. Either way, applicants can choose between the two since both fit Minnesota's statutory requirements. Because of the variations in course length and the vagueness of the concealed carry statutes, what constitutes a satisfactory education or demonstration of range skills, and how the course is structured, can depend solely on the firearm instructor.

One of the few CCW programs that has consistent training requirements is the federally implemented Law Enforcement Officer Safety Act (LEOSA), which allows "qualified" active and retired law enforcement officers to carry a concealed firearm in any state.²⁴ To earn this privilege, qualified retired officers are required under LEOSA to complete the officer training course of their resident state or a similar course meant for active-duty officers within the state.²⁵ This is arguably the closest to a standardized training requirement for individuals wishing to carry concealed weapons. Yet, it can still be affected by differences between state law enforcement agencies' shooting exams. Furthermore, its scope is limited since it is applicable only to active and retired law enforcement officers, not civilians.²⁶

B. Firearm Training and Education Can Improve General Firearm Safety, Decrease Improper Defensive Gun Usage, Better Prepare Defensive Shooters for Engagements, and Reduce Deadly Interactions with Law Enforcement

While firearm regulation is often a partisan issue, the issues resulting from insufficient training and education when using a firearm are common sense. This note underlines several of those common-sense issues. First, the upswing in states no longer requiring training or education for concealed carry creates a dangerous rise of gun owners who do not understand basic firearm safety.²⁷ Furthermore, a lack of training increases the likelihood that concealed-firearm carriers will improperly use their firearms and face legal liability.²⁸ It also reduces the likelihood that citizens will fully understand how to handle the aftermath of a defensive shooting.²⁹ Finally, training decreases the risk of acting improperly and endangering the carrier when interacting with police officers.³⁰

24. See Law Enforcement Officer Safety Act, 18 U.S.C. § 926B (2004).

25. 18 U.S.C. § 926C(4) (2004).

26. *Id.*

27. *Infra* Section B, Part 1.

28. *Infra* Section B, Part 2.

29. *Infra* Section B, Part 3.

30. *Infra* Section B, Part 4.

1. *Proper Firearm Training and Education Can Reduce the Risk of Accidental Shootings and Injuries*

At a bare minimum, individuals carrying or using firearms should be taught the basic safety requirements of handling, cleaning, and storing their firearms.³¹ These rules include the most basic, standard four rules of firearm safety—rules that every firearm owner should be cognizant of any time he or she is around a gun. They are: (1) always treat every firearm as though it is loaded, (2) never point the gun at anything you are not willing to destroy, (3) keep your finger outside the trigger guard until ready to shoot, and (4) always be sure of your target and what is in front of it and behind it.³² While there are other important, more nuanced rules that every firearm user should follow,³³ these four rules, if followed attentively, should ensure that a firearm user does not accidentally fire his or her weapon (known as a negligent discharge), which might harm the user or others.³⁴

However, in spite of the ubiquity of these rules, in 2018 alone, more than 1,600 unintentional shootings that led to injury or death happened in the United States.³⁵ Not every incident involved concealed carry, but with proper training and education, many could have been avoided.³⁶ None of the sixteen permitless carry states requires individuals to be taught these four foundational rules of firearm safety, greatly increasing their risk in handling their firearms.³⁷ For at least the portion of those 1,600 incidents where the firearm was used by someone who carried a concealed firearm, mandatory training and education could have reduced the number of injuries and deaths per year from accidental shootings by instilling proper handling techniques in the owner. As Kelly Vanden, owner of Criterion Tactical, a firearms training center in San Antonio, states:

I always use the driving analogy: You get your teenager behind the wheel, it's a complete mess. . . . It's the same thing with a weapon. You get a person who's unfamiliar and put a live

31. See *The 4 Rules of Firearm Safety*, HUNTER ED, <https://www.hunter-ed.com/gun-safety> (last visited Apr. 10, 2019).

32. *Id.*; Cameron Hopkins, *Jeff Cooper: Father of Modern Pistol Shooting*, NRA AMERICAN RIFLEMAN (May 18, 2011), <https://www.americanrifleman.org/articles/2011/5/18/jeff-cooper-father-of-modern-pistol-shooting>; Bruno Adrovini, *The 4 Rules of Gun Safety*, GUNSWEEK.COM (Nov. 2, 2016, 5:50 PM), <https://www.gunsweek.com/en/technics/articles/4-rules-gun-safety>; *The Four Rules of Firearm Safety*, LIBERTY HOME CONCEALMENT, <https://libertyhomeconcealment.com/pages/the-four-rules-of-firearm-safety> (last visited Mar. 1, 2020).

33. See *NRA Gun Safety Rules*, NRA EXPLORE, <https://gunsafetyrules.nra.org> (last visited Mar. 1, 2020).

34. Staff Writer, *The Four Rules of Gun Safety for Beginners (and Everyone Else)*, THE TRUTH ABOUT GUNS (Feb. 11, 2019), <https://www.thetruthaboutguns.com/the-four-rules-of-gun-safety-for-beginners-and-everyone-else>.

35. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> (last visited Apr. 10, 2019).

36. See *How Can Proper Gun Safety Lower the Number of Accidents?*, AFTERMATH, <https://www.aftermath.com/content/accidental-shooting-deaths-statistics> (last visited Mar. 1, 2020).

37. See HNL, *supra* note 3.

weapon in their hand and expect them to be both competent and safe, you're asking a lot of that person.³⁸

2. *Education on Self-Defense Law and Firearm Use Can Reduce the Number of Illegitimate Defensive Gun Uses*

Beyond the technical understanding of how to handle a firearm, education and training can help reduce legal liability for defensive shooters by ensuring that concealed firearms are used at legally permissible times. Firearm laws vary greatly by state, with different regulations on when lethal force is acceptable to use.³⁹ The subtle distinctions that exist in self-defense law, such as when engaging an assailant is allowed or when disengagement is required, are distinctions that should be taught to all individuals carrying concealed firearms. In 2000, two national studies on gun use for self-defense analyzed when guns were used defensively and whether the use was legally justified. The researchers in one study found that only 43 percent of Defensive Gun Uses (DGU) were deemed by judges to be legally justified uses of firearms.⁴⁰ The National Crime Victimization Survey conducted by the US Census Bureau found that between 2007 and 2011, 47,000 DGUs were reported, but 17 percent of those DGUs were incidents where a gun was improperly used in response to mere verbal threats.⁴¹ Even drawing a firearm in response to mere verbal threats is often unnecessary and illegal, much less actually firing the weapon.

Had the populations cited in these surveys been more educated on what constitutes proper use of a firearm in a defensive confrontation, the statistics of illegal, unjustified DGUs may have been substantially lower. While there are classes and books that can teach individuals what general laws need to be followed when using a firearm defensively,⁴² this education

38. Mascia, *supra* note 19.

39. See Eugene Volokh, *Citizen Kills Robber Who Has What Turns out to Be an Imitation Gun—Is the Killing Lawful Self-Defense?*, WASH. POST (Nov. 2, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/02/citizen-kills-robber-who-has-what-turns-out-to-be-an-imitation-gun-is-the-killing-lawful-self-defense/>; contrast Illinois's laws on deadly force against robbers with Texas's. *Can You Shoot a Fleeing Thief? Texas*, U.S. & TEX. LAWSHIELD (Apr. 2, 2019), <https://www.uslawshield.com/defend-property-texas>.

40. Daniel W. Webster et al., *Concealed Carry of Firearms: Facts v. Fiction*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Nov. 16, 2017), <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/concealed-carry-of-firearms.pdf>.

41. *Id.* Using a firearm in response to a verbal threat is often considered “excessive force.” Many states require that a firearm should only be used defensively to protect the actor or anyone else against death or serious bodily harm, with some allowing use when a violent felony is in action. North Dakota is an example of a state that allows for defense of self and others and against violent felonies. N.D. CENT. CODE § 12.1–05 (1973).

42. One set of examples is Massad Ayoob's series of classes, such as his Mag-40 class. Mag-40 is “an intense, four-day, 40-hour immersion course in the ‘rules of engagement’ for armed law-abiding private citizens. The course emphasizes legal issues, tactical issues, and aftermath management.” *MAG40*, MASSAD AYOOB GRP., <https://massadayoobgroup.com/mag-40> (last visited Mar. 1, 2020). Having personally taken Mag-40's predecessor, Lethal Force Institute, from Mas-

should be required of all citizens legally carrying concealed firearms. An increase in the understanding of when a gun can legally be used in a defensive situation will help reduce the legal risk to those carrying firearms by educating them on when lethal force, or even just drawing their firearms, is a legally acceptable answer to an altercation.

3. *Self-Defense Education Ensures That Citizens Carrying Concealed Weapons Understand How to Act during a Defensive Gun Use*

Even if a citizen understands the techniques and laws for self-defense with a firearm, there are still personal and legal issues after a defensive shooting of which citizens need to be aware. As Massad Ayoob, an authority on self-defense tactics, law, and training, states: “Never forget that when you shoot someone, however necessarily and justifiably, you look an awful lot like a killer and he looks an awful lot like a victim. . . . The old saying ‘You only get one chance to make a first impression’ is absolutely true here.”⁴³ Even if citizens believe they fired their firearms in the correct setting, they still need to be trained on what to do *after* they fire their weapons. From a legal perspective, Ayoob recommends following the five-point checklist he established, which has been adopted by the US Concealed Carry Association (USCCA) as its official recommendation of what to do after a “critical incident.”⁴⁴ The list includes: (1) establish the active dynamic—meaning you should inform authorities immediately of what happened, emphasizing what the attacker was trying to do to you when you fired your weapon so that police know who the victim is and who the attacker is; (2) advise the police that you will sign a complaint stating you were attacked; (3) point out the evidence; (4) point out the witnesses; and (5) politely decline further questioning until you have consulted an attor-

sad Ayoob, I can say that, the legal and technical education was substantially more in-depth than my own state’s CCW permit class. Massad Ayoob’s book, *Deadly Force*, also covers the topic of legal DGU and law. MASSAD AYOOB, *DEADLY FORCE: UNDERSTANDING YOUR RIGHT TO SELF DEFENSE* (2014). Additionally, a more comprehensive look at the law of self-defense comes from Andrew Branca’s book, *The Law of Self Defense: The Indispensable Guide for the Armed Citizen*. ANDREW F. BRANCA, *THE LAW OF SELF DEFENSE: THE INDISPENSABLE GUIDE FOR THE ARMED CITIZEN* (3rd ed. 2016).

43. AYOOB, *supra* note 42, at 202. The Armed Citizens’ Legal Defense Network describes Massad Ayoob as

one of the pre-eminent fighting handgun trainers in the world. His methods of reflexive, high speed yet accurate shooting has been adopted by the U.S. Army as part of its standard pistol-training course. Former director of Lethal Force Institute, and owner/operator of the Massad Ayoob Group, he is directly responsible for training thousands in justifiable use of deadly force, safe gun use and effective defense techniques.

Emotional and Psychological Aftermath of a Self-Defense Shooting, ARMED CITIZENS’ LEGAL DEF. NETWORK, <https://armedcitizensnetwork.org/en/preview-emotional-and-psychological-aftermath-of-a-self-defense-shooting> (last visited May 10, 2019).

44. AYOOB, *supra* note 42, at 202. “Critical incident” is a term now being used for incidents where a person needs to use his or her firearm in self-defense.

ney.⁴⁵ These five steps can improve the legal process and outcome for those who fire their concealed weapons. However, they may not be required teachings in many concealed carry courses. In Minnesota, for example, the statute is silent on education or training about what to do after a critical incident occurs.⁴⁶

Likewise, there are actions that need to take place after a shooting occurs that may not be taught in classrooms. The USCCA has a breakdown of what to do in the first forty-eight hours after a defensive shooting, what to expect, and how to handle it.⁴⁷ These actions include holstering your weapon by the time police arrive, asking a witness to call for an ambulance, meeting with an attorney the next day, and planning what to say to ensure police get a clear picture of what happened.⁴⁸ Following these steps can help reduce legal liability for a defensive shooter but can also help reduce the overall damage in a critical incident. Ensuring an ambulance quickly arrives to the scene, checking whether the attacker is alive or not, and making sure police are called immediately afterward can help save lives.

After the incident, the defensive shooter often still faces psychological and emotional challenges. Ayoob explains that citizens who use their firearms for self-defense often suffer from “The Mark of Cain” syndrome—a situation after a shooting where society sees a defender as “someone who has killed,” affecting how the defender perceives himself or herself.⁴⁹ The psychological effects after a shooting can include nightmares, insomnia, depression, substance abuse, sexual dysfunction, social withdrawal, and self-doubt.⁵⁰ It is important that citizens who carry concealed firearms understand what they might endure if they use their firearms defensively.

Citizens in permitless carry states or states with minimal training and education requirements are not necessarily trained on the actions that need to be taken during a self-defense shooting or on the legal and psychological consequences that occur afterward. Including these lessons in mandatory concealed carry training will ensure that those who carry concealed firearms are more knowledgeable and more prepared for the risks and actions they might take.

45. *Id.* at 202–06.

46. § 624.714, *supra* note 20.

47. Robert H. Carp, *48 Hours: What Really Happens After a Self-Defense Shooting*, USCCA, <https://www.usconcealedcarry.com/blog/first-48-hours-self-defense-shooting> (last visited May 10, 2019).

48. *Id.*

49. ARMED CITIZENS’ LEGAL DEF. NETWORK, INC., *supra* note 43.

50. *Id.*

4. *Firearm Training and Education Reduces the Risk Civilians Carrying a Concealed Firearm and Officers Face When Interacting with Each Other*

In the states that have recently moved to or are currently debating moving to a permitless carry system and eliminating any state-required training or educational requirements, members of local law enforcement have voiced their concerns regarding officer and civilian safety.⁵¹ Officers have two concerns related to increased risk during police-citizen interactions: the inability to know who is carrying a firearm and the lack of training for those carrying concealed firearms.⁵² Whether police knowing if an individual has a firearm reduces police-civilian interaction risks or not is outside the scope of this note.⁵³ However, law enforcement agencies' concerns about training and education are directly related to this note's proposed legislation.

Reducing the amount of education and training a citizen carrying a concealed weapon receives, or eliminating it altogether, increases the risk to all parties during police-citizen encounters.⁵⁴ There are specific best practices an individual who is legally carrying a concealed weapon should follow when interacting with police.⁵⁵ Examples include never reaching

51. Caitlin Thomas, *SPD Captain Says New Permitless Carry Law Is a 'Step Backward,'* O'COLLY MEDIA GRP. (Feb. 28, 2019), http://www.ocolly.com/news/spd-captain-says-new-permitless-carry-law-is-a-step/article_62affbb4-3bb2-11e9-944f-472d7dc0969a.html; Kala Kachmar, *You No Longer Need a Permit for Concealed Carry. What That Means for Gun-Loving Kentucky*, COURIER J. (June 25, 2019, 10:44 AM), <https://www.courier-journal.com/story/news/2019/06/25/kentucky-new-concealed-carry-law-what-it-means-for-gun-loving-state/1511455001>; Campbell Robertson & Timothy Williams, *As States Expand Gun Rights, the Police Object*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/04/us/as-states-expand-gun-rights-police-join-opposition.html>.

52. Thomas, *supra* note 51.

53. There are several factors in assessing whether permitless carry is a safe, reliable model for civilian concealed carry. Training and education, which are discussed in this note, are two. Not requiring citizens who carry concealed firearms to submit to background checks or psychiatric assessments is another. The concern officers note above is that they cannot look up whether someone they are stopping has a CCW permit or not, so they cannot determine if that person is likely carrying a gun or not.

54. See Sheriff Jim Wilson, *Traffic Stops: What CCW Citizens Need to Know*, NRA FAMILY (Mar. 7, 2018), <https://www.nrafamily.org/articles/2018/3/7/traffic-stops-what-ccw-citizens-need-to-know>. There are both legal and safety risks to being uneducated on how to handle police stops while armed; some states carry a duty to inform, while others do not.

55. Rob Pincus, *What Can We Learn from the Castile Shooting?*, PERS. DEF. NETWORK, <https://www.personaldefensenetwork.com/article/can-learn-castile-shooting> (last visited Apr. 9, 2019). Rob Pincus is a professional defensive firearms trainer, writer, and consultant. He has had substantial law enforcement and military training and continues to write, consult, and teach defensive shooting and defensive tactics. He is considered an authority in the defensive shooting and carry industry. Rob Pincus, I.C.E. TRAINING, <https://www.icetraining.us/robpincus.html> (last visited Apr. 9, 2019). For a brief explanation of what to do when someone is carrying a concealed firearm and stopped by law enforcement, see Sam Hooper, *How to Interact with Police While Carrying CCW*, ALIEN GEAR HOLSTERS (Aug. 29, 2018, 7:00 AM), <https://aliengearholsters.com/blog/how-to-interact-with-police-while-carrying-concealed-ccw>.

toward your firearm without express permission and supervision, understanding when to inform officers that you are carrying a firearm (often referred to as a “duty to inform”), and knowing how to calmly speak with officers once you have informed them that you are armed.⁵⁶ These standards are in place to reduce incidents of officers mistakenly believing that a concealed-firearm carrier is reaching for his or her gun or making some other potentially threatening gesture, causing the officer to respond with lethal force. The recent deaths of Philando Castile in Minnesota and Jason Washington in Oregon demonstrate the gravity of these concerns.⁵⁷ In both situations, a citizen who was legally carrying a concealed firearm made a gesture toward his firearm without any intent to use it, but the officer he was interacting with interpreted the move as threatening and shot the citizen.⁵⁸ While there has been substantial discussion of what other factors led to these innocent concealed-firearm carriers being shot, such as improper police training and racial bias,⁵⁹ adherence to best practices, if not already followed in those incidents, may have minimized the potential for conflict.

Citizens in states lacking a training requirement presumably do not learn how to properly interact with officers or how to follow these best practices, which is an issue of grave concern. Even in states with training and education requirements, such as Minnesota where Philando Castile was shot, there is no explicit requirement to teach CCW applicants how to interact with police.⁶⁰ Ignorance of how to interact with officers while carrying a concealed weapon can turn an average traffic stop into a deadly incident

56. Hooper, *supra* note 55.

57. Pincus, *supra* note 55. The example given in Rob Pincus’s article is the 2016 shooting of Philando Castile. Pincus notes that there were several factors at play in the shooting of Philando Castile, many of which pointed towards the officer’s conduct. Another incident of a CCW permit holder being killed in a police interaction unnecessarily happened near Portland State University. Jason Washington had a valid CCW, but after police responded to a call about a man near a fight with a firearm, they arrived to find Washington. When Washington accidentally dropped his gun, he moved to pick it up, at which point the officers fired upon him and killed him. Jenni Fink, *Navy Veteran Shot by Portland Campus Police After Gun Fell from Holster Had Concealed Carry Permit*, NEWSWEEK (July 3, 2018, 11:25 AM), <https://www.newsweek.com/navy-veteran-shot-portland-campus-police-after-gun-fell-holster-had-concealed-1006068>. In both the Philando Castile incident and the Jason Washington incident, the officers stated they were concerned the CCW holder was reaching for his firearm, which is why the officers fired their weapons. In both cases, the officers were not convicted. See Ericka Cruz Guevarra, *PSU Police Shot at Jason Washington* 17 Times, Report Says, OPB (Sept. 19, 2018, 11:15 AM), <https://www.opb.org/news/article/portland-state-police-jason-washington-autopsy-report>; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>.

58. Pincus, *supra* note 55; see also Fink, *supra* note 57.

59. Eric J. Cooper, *A Police Officer Didn’t Kill Philando Castile. Implicit Bias Did*, HUFFPOST (June 30, 2017, 9:54 AM), https://www.huffpost.com/entry/a-police-officer-didnt-kill-philando-castile-implicit_b_595654c0e4b0c85b96c660fc; David Kopel, *Bad Police Training May Have Killed Philando Castile*, WASH. POST (June 22, 2017, 3:58 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/22/bad-police-training-may-have-killed-philando-castile>.

60. § 624.714, *supra* note 20.

simply because the citizen made a move that the officer interpreted as threatening—a move that could have been avoided had the citizen understood best practices.

Indeed, police officers themselves often advocate for training. In February 2019, Oklahoma passed H.B. 2597, which implements permitless carry and removes training and education requirements for citizens carrying concealed weapons.⁶¹ Oklahoma City Police Chief Bill Citty voiced his concern over the bill's passage, noting that "good people make mistakes."⁶² Citty stated that due to the new law, police will have to update their training policy in order to more appropriately respond to more people who are armed during everyday calls.⁶³ Stillwater, Oklahoma Police Department Captain Kyle Gibbs echoed this concern over H.B. 2597's elimination of required training and recommended that individuals who wish to carry concealed firearms should seek out training on their own.⁶⁴ In Ohio, the Fraternal Order of Police opposed the state's recent proposal for permitless carry, stating that concealed carry training is key to safety.⁶⁵

While the proposed legislation in Section III can help reduce the number of deadly citizen-officer interactions, it would be disingenuous to say that it can solve the problem entirely. There are other factors that can influence interactions between officers and civilians, such as racial bias and improper police training. This is one of the reasons the proposed legislation in Section III requires that officers themselves train permit holders to help both parties understand how to interact with each other. Therefore, to help maximize the safety of concealed carry permit holders interacting with law enforcement officers, a required training and education program that includes best practices on how to interact with police while carrying a firearm should be implemented in every state.

III. CONGRESS SHOULD INCENTIVIZE STATES TO ADOPT A FEDERALLY ESTABLISHED MINIMUM EDUCATION AND TRAINING REQUIREMENT THROUGH THE SPENDING CLAUSE

Considering the importance of training and education for firearm users generally and the increased risk of incident for concealed-firearm carriers, this note proposes the Citizen's Firearm Education and Training Safety Act (CFETS Act) (Appendix A). The CFETS Act is based on the conditional

61. H.B. 2597, 57 Leg., 1st Reg. Sess. (Okla. 2019).

62. KFOR-TV & K. Querry, *Oklahoma City Police Chief Discusses Concerns Regarding Permitless Carry*, News 4 (Mar. 1, 2019, 2:54 PM), <https://kfor.com/2019/03/01/oklahoma-city-police-chief-discusses-concerns-regarding-permitless-carry>.

63. *Id.*

64. Thomas, *supra* note 51.

65. Jessie Balmert, *Kentucky Just Let People Carry Concealed Guns Without a Permit. Ohio Introduces a Similar Bill*, CIN. ENQUIRER (Mar. 28, 2019, 1:50 PM), <https://www.cincinnati.com/story/news/politics/2019/03/28/kentucky-just-eliminated-permits-concealed-carry-ohio-follow/3299750002>.

grant funding technique reviewed in *South Dakota v. Dole*.⁶⁶ This model for legislative action may seem derivative; Congress will not actually pass legislation requiring the states to implement a minimum training program. Instead, Congress will incentivize states to do so by restricting the amount of funding that noncompliant states receive. However, there are two primary purposes for passing this style of legislation.

First, it is empirically effective.⁶⁷ When Congress passed the National Minimum Drinking Age Act to incentivize states to raise the minimum drinking age to twenty-one by withholding federally granted highway funds, the remaining noncompliant states all raised their minimum age to twenty-one within four years of the act's passage.⁶⁸ The second purpose for using this model of legislation is critical; the conditional grant funding technique reviewed in *Dole* allows Congress to achieve policy goals that, if passed as a federal mandate on states, would be considered unconstitutional.

A. Federally Mandating a Minimum Training Requirement Will Violate the Anticommandeering Precedents of the Tenth Amendment

The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁶⁹ The primary purpose of the Tenth Amendment is to establish the bounds of federalism, with one primary concern focusing on acts of Congress that "commandeer" the rights of state legislatures⁷⁰ or state officials.⁷¹ Congress commandeers state legislatures or state officials when it enacts regulation that either demands that state officials execute and enforce the federal regulation⁷² or demands that state legislatures "regulate pursuant to Congress' direction."⁷³ These commandeering acts violate the core of the Tenth Amendment; namely, the limitation of power on the federal government and the reservation of power to the states.⁷⁴ Two fundamental "anticommandeering" cases, *Printz v. United*

66. *South Dakota v. Dole*, 483 U.S. 203 (1987).

67. Upon passage of the National Minimum Drinking Age law, the states that held out for lower drinking ages acquiesced to a higher drinking age so they could receive federal highway grants. See Lisa Belkin, *Wyoming Finally Raises Its Drinking Age*, N.Y. TIMES (July 1, 1988), <https://www.nytimes.com/1988/07/01/us/wyoming-finally-raises-its-drinking-age.html>; see also *State History of MLDA 21*, PROCON.ORG (Mar. 3, 2016), <https://drinkingage.procon.org/state-history-of-mlda-21>.

68. See Belkin, *supra* note 67; see also *State History of MLDA 21*, *supra* note 67.

69. U.S. CONST. amend. X.

70. *New York v. United States*, 505 U.S. 144, 178 (1992); *Printz v. United States*, 521 U.S. 898, 905 (1997).

71. *Printz*, 521 U.S. at 933; see also *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018).

72. See *Printz*, 521 U.S. at 898.

73. *New York*, 505 U.S. at 174.

74. *Id.* at 157.

States and *New York v. United States*, underline precisely why laws mandating that states enact a minimum training and education requirement for concealed-firearm carriers would be unconstitutional.

If Congress were to attempt to mandate a federally established minimum training and education requirement, it would have to do so in one of two ways. The first route would be to pass legislation requiring that all law enforcement officers in the states administer the proposed training before issuing a CCW permit. Alternatively, Congress could pass legislation that requires all citizens receive the minimum training before carrying a firearm and demands that state law enforcement officers enforce the requirement. In either situation, Congress is demanding state officials enforce federal regulations, a demand that violates the holding of *Printz v. United States*.

In *Printz*, the Brady Handgun Violence Prevention Act (Brady Act) required the chief law enforcement officer (CLEO) of each local jurisdiction to conduct background checks of prospective handgun purchasers until a national system for background checking could be completed.⁷⁵ In response, Jay Printz and Richard Mack, the CLEOs of Ravalli County, Montana, and Graham County, Arizona, respectively, challenged the provisions of the Brady Act that required CLEOs to perform background checks, asserting that such a mandate was unconstitutional.⁷⁶ The Court analyzed the CLEOs' challenge in "historical understanding and practice, in the Constitution's structure, and in this Court's jurisprudence."⁷⁷ It then cited *New York v. United States* in holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."⁷⁸ The Court struck down the offending portion of the Brady Act for imposing mandatory obligations on state officials.

If Congress attempted to require that state CLEOs administer the proposed training program, this would parallel the Brady Act's mandate that CLEOs administer background checks and thus violate the holding in *Printz*. Alternatively, Congress could mandate that the citizens themselves must receive acceptable training.⁷⁹ However, enforcement of this mandate

75. *Printz*, 521 U.S. at 903; 18 U.S.C.A. § 922(s)(1)(A)(i)(III, IV).

76. *Printz*, 521 U.S. at 904.

77. *Id.* at 905.

78. *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 933.

79. This is a debatable premise. Congress can pass mandates on individuals acting in their personal capacity as citizens. *New York*, 505 U.S. at 930–31. However, a law forcing a mandate on an individual requires some form of constitutional power granted to Congress to pass the mandate. The power that Congress would likely claim to use here would be the Commerce Clause, or the power of Congress to regulate interstate commerce. U.S. CONST. Art. I § 8, cl. 3. A possible theory for using the Commerce Clause is that state CCW reciprocity creates enough interstate commerce that it can be regulated by the Federal Government. Concealed carry reciprocity is the ability to get a CCW Permit in one state and have it honored in another state. *CCW Reciprocity Maps, GUNS TO CARRY*, <https://www.gunstocarry.com/ccw-reciprocity-map> (last visited Apr. 12, 2019). Some individuals specifically seek out CCW Permits from other states (many states allow nonresidents to apply and acquire their CCW permits) because they want more favorable reciproc-

could be done at only the federal level; any legislation that requires state officials to enforce the mandate on individuals would also violate *Printz* and thus be unconstitutional.

In either case, without enforcement by state officials, any federal law imposing training and education requirements would be functionally unenforceable. In 2017 alone, there were 17,251,354 CCW permits in the United States.⁸⁰ This number does not include the sixteen states that allow permitless carry since knowing who is carrying a concealed firearm in the permitless carry states is impossible. Requiring that these CCWs and permitless carry citizens seek out and receive the training and education on their own before applying for their state CCW permit (or simply beginning to carry concealed firearms in a constitutional carry state) would create an unenforceable requirement. Without state support, effective federal enforcement of an individual mandate on citizens to receive training would be prohibitively expensive and practically impossible.

The second way Congress could attempt to mandate a federally established minimum training requirement is by requiring state governments to enact the legislation themselves. Here, *New York* gives guidance on why this method is also unconstitutional. In *New York*, the Court considered the constitutionality of the Low-Level Radioactive Waste Policy Act.⁸¹ The act was intended to address the growing problem of radioactive waste management in the United States, as sites that could safely store radioactive material away from humans were becoming scarce.⁸² The premise of the act was to use three incentive programs to encourage or require states to open radioactive waste containment sites.⁸³ Of the three incentive programs, two were held constitutional. One used *Dole*-style grant limitations discussed further below.⁸⁴ The other used Congress's commerce power to allow states the option of shutting off access from their sites to other states that do not

ity agreements. Currently, the average state recognizes permits from 30 other states, which supports the idea of a "market" of CCW permits. Brandon Moseley, *Mike Rogers Cosponsors Concealed Carry Reciprocity Act*, ALA. POL. REP. (Jan. 30, 2019), <https://www.alreporter.com/2019/01/30/mike-rogers-cosponsors-concealed-carry-reciprocity-act>. The argument in favor of using the commerce clause is that concealed carry permit reciprocity creates an interstate commerce market. Just as the Court held in *Gonzales v. Raich*, 545 U.S. 1, 17 (2005), even if an individual does not use interstate reciprocity for their concealed carry permit, their purely local activity could be part of an economic "class of activities," namely the system of reciprocity and individuals applying for other states' CCW permits.

With the justification above, a minimum training and education requirement on individual citizens may be constitutional under the Commerce Clause of the Constitution, but as this essay explains, that mandate would still be functionally unenforceable without states' officers' assistance, therefore violating anticommandeering law.

80. *Concealed Carry Statistics*, GUNS TO CARRY, <https://www.gunstocarry.com/concealed-carry-statistics/#numbers> (last visited Mar. 1, 2020).

81. *New York*, 505 U.S. at 149; 42 U.S.C. § 2021b (1986).

82. *New York*, 505 U.S. at 150.

83. *Id.* at 150–51.

84. *Id.* at 171–72.

conform to the federal regulation.⁸⁵ The third incentive, known as the “take title” provision, required that states either take title possession of radioactive waste generated in their borders or regulate their waste according to the Low-Level Radioactive Waste Policy Act.⁸⁶ The “take title” provision was found to be unconstitutional because it created a lose-lose scenario where Congress essentially forced state legislatures to enact specific legislation.⁸⁷ The Court held that mandating that states adopt state regulations or coercing them into doing so violates the boundaries between state and federal power and therefore violates the Tenth Amendment.⁸⁸

Thus, Congress is barred from *requiring* that states pass their own training and education requirement statutes and cannot coerce them into doing so. However, as the Court notes in *New York*, there is still the constitutionally valid option laid out in *Dole*. Congress can *incentivize* states to enact regulations by using congressional spending power to reasonably limit grants to states that do not implement Congress’s preferred legislation. The distinction between *incentivize* and *coerce* is discussed below.

B. Congress Should Use Its Spending Power to Incentivize States to Adopt the Proposal by Withholding Grant Funding from Noncompliant States

As the *New York* Court noted, if Congress wants to pass legislation incentivizing state action, it may do so through the Spending Clause by attaching conditions on the receipt of federal grants.⁸⁹ This method of incentivizing state action was most clearly enunciated as a constitutional use of the Spending Clause in *South Dakota v. Dole*.⁹⁰

In 1984, Congress passed the National Minimum Drinking Age Act.⁹¹ The act limited federal grants for state highway projects to those states that passed legislation implementing a minimum drinking age of twenty-one.⁹² States that refused would have 5 percent of their possible federal highway funds withheld.⁹³ South Dakota, one of the few states that did not have a minimum drinking age of twenty-one or older, challenged this law, stating the act “violate[d] the constitutional limitation on congressional exercise of the spending power.”⁹⁴ The court noted that the Spending Clause of the Constitution “empowers Congress to ‘lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence

85. *Id.* at 173.

86. *Id.* at 186.

87. *Id.*

88. *See New York*, 505 U.S. at 188–89.

89. *Id.* at 167.

90. *South Dakota v. Dole*, 483 U.S. 203 (1987).

91. 23 U.S.C. § 158 (1984).

92. *Id.*

93. *Dole*, 483 U.S. at 204.

94. *Id.* at 205.

and general Welfare of the United States”⁹⁵ and that incidental to that power is the ability to attach conditions to the receipt of federal funds “to further broad policy objectives.”⁹⁶ Therefore, Congress’s withholding of federal grants for highway funds from states that did not have a minimum drinking age of twenty-one was constitutional.⁹⁷

However, in coming to its conclusion, the Court established a multi-element test that limits Congress’s power to use the Spending Clause to incentivize state action.⁹⁸ Each element of the test must be met for the legislation in question to be a proper use of the spending power.⁹⁹ These elements are (1) the spending must serve the “general welfare”; (2) the condition placed on the state to receive funding must be unambiguous; (3) the condition has to relate to the particular federal program; (4) the act required to receive the funds cannot be unconstitutional; and (5) the amount being restricted by Congress cannot be so great that it can be considered coercive to the state’s acceptance of the condition.¹⁰⁰ As explained below, the CFETS Act meets each element of the *Dole* test.

1. Establishing Minimum Training and Education Requirements Serves the “General Welfare”

Conditioning federal grants requires that the condition imposed exists to serve or promote the “general welfare” of the nation.¹⁰¹ What constitutes general welfare, however, is up to the discretion of Congress, and the courts cannot rule that a restriction is not for the general welfare unless it is clearly wrong, a display of arbitrary power, or not an exercise of judgment.¹⁰² It is difficult to find even one case where the general welfare requirement was not met in a statute utilizing conditional grants. In fact, the Supreme Court itself has stated that, because of the amount of deference given to Congress, there is “question[] whether ‘general welfare’ is a judicially enforceable restriction at all.”¹⁰³ In either case, the Court in *Dole* indicated that increasing the safety of citizens and preventing lost lives constitutes general welfare.¹⁰⁴

The CFETS Act directly serves the general welfare. As Section II established, an increase in concealed carry training and education can help reduce deadly police interactions and accidental shootings. Requiring edu-

95. *Id.* at 206 (citing U.S. CONST. art. I, § 8, cl. 1).

96. *Id.* at 206.

97. *Id.* at 212.

98. *Id.* at 207–08, 211; *New York v. United States*, 505 U.S. 144, 178 (1992).

99. *Dole*, 483 U.S. at 207.

100. *Id.* at 207–08, 211.

101. *Id.* at 207 (citing *U.S. v. Butler*, 297 U.S. 1, 67 (1936)).

102. *Helvering v. Davis*, 301 U.S. 672, 641 (1937).

103. *Dole*, 483 U.S. at 207 n.2.

104. *Id.* at 208. The Court noted that having young people drinking and driving on the roads created a dangerous situation and that mitigating that situation served the “general welfare.”

cation and training to reduce the number of potentially dangerous firearm situations and save lives parallels the logic of raising the drinking age to reduce the number of dangerous drinking and driving incidents. Both increase safety to citizens and prevent lost lives.¹⁰⁵ With those benefits from training and education alone, the CFETS Act passes the general welfare test. Furthermore, given Congress's wide discretion and the courts' unwillingness to challenge congressional determinations of general welfare, it will be difficult to say that the CFETS Act's benefits of reducing improper defensive gun uses and of preparing concealed-firearm carriers for the legal and nonlegal ramifications do not qualify as serving the general welfare. Therefore, the proposal passes the first element of the *Dole* test.

2. *The CFETS Act Is Unambiguous in the Condition It Sets on States to Receive the Conditional Grants*

The second element of the test enunciated in *Dole* is that the condition set on the grant funding must be unambiguous.¹⁰⁶ This does not mean that the CFETS Act needs to be meticulously drafted in complete detail at this point, but that when the legislation is passed, the condition the state must follow to receive the grant funding is set out unambiguously. As the Court in *Pennhurst State School and Hospital v. Halderman* noted, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly."¹⁰⁷ In the current proposal, the CFETS Act mandates that states must require their citizens who wish to carry concealed firearms complete the federally established training and education program, otherwise those states will not receive a percentage of federal grants for law enforcement. The CFETS Act's language for the condition is modeled after the National Minimum Drinking Age Act of 1984 and is explicit.¹⁰⁸ Either states enact the education and training program, or they do not receive the funding. There is no substantive ambiguity to the condition, so the proposal above is explicit enough to pass the second element of the *Dole* test.

3. *The CFETS Act Relates to the Expenditure of Funds Because State and Local Law Enforcement Are Affected by Concealed-Firearm Carriers*

The third element of the *Dole* test is that the "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in

105. For the benefits of the Minimum Legal Drinking Age Act, see *Fact Sheets - Age 21 Minimum Legal Drinking Age*, CDC, <https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm> (last updated Jan. 7, 2020). See also *infra* Section II, Part B.

106. *Dole*, 483 U.S. at 208.

107. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981).

108. National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).

particular national projects or programs.’”¹⁰⁹ This means that when a condition is placed on a grant, the condition must be related to the goal of the proposed legislation.¹¹⁰ In *Dole*, the National Minimum Drinking Age Act of 1984 restricted federal grants for highway funding unless the states raised their minimum drinking age to twenty-one.¹¹¹ The justification was that teenagers in states with a higher drinking age would use the highways to drive to states with a lower drinking age, become intoxicated, and then drive back home, creating a dangerous environment on the highway.¹¹² The *Dole* Court held that the restriction on federal highway funds was reasonably related to the goal of the National Minimum Drinking Age Act of 1984—maintaining safety on the highway.¹¹³ The CFETS Act parallels the relationship discussed in the *Dole* case by proposing legislation that leads to a safer, more informed, and more legally cognizant population and by restricting funds dedicated to the same objectives.

While the federal government has more than one set of grants it awards to state and local police departments, the best candidate for grant restrictions is the set offered by the Office of Justice Programs (OJP). Currently the OJP has several grants that are available for local and state police agencies.¹¹⁴ These grants range in topics from training officers on body camera usage to helping agencies promote public safety,¹¹⁵ but the core objective of all the grants is to promote the vision of the OJP—“Safe, Just and Engaged Communities.”¹¹⁶ Likewise, the proposed legislation promotes the same objectives. As discussed in Section II, firearms training and education can increase public safety through proper handling of firearms. It can also increase citizens’ safety by teaching citizens carrying concealed weapons how to appropriately interact with police officers.¹¹⁷ The CFETS Act also improves safety by educating concealed firearm users on how to respond after using their firearms, mitigating the damage of violent incidents, and reducing the likelihood of someone being unnecessarily hurt.¹¹⁸ Likewise, education and training creates a more legally cognizant society by teaching citizens when it is appropriate to use their firearms defensively, thereby reducing illegitimate DGUs and legal liability.¹¹⁹ Thus, the proposed legislation should, at the very least, restrict the awarding of a percent-

109. *Dole*, 483 U.S. at 207–08.

110. *Id.*; *Massachusetts v. United States*, 435 U.S. 444, 461 (1978).

111. 23 U.S.C. § 158 (1984).

112. *Dole*, 483 U.S. at 208–09.

113. *Id.*

114. *Current Funding Opportunities*, OFF. OF JUST. PROGRAMS, <https://ojp.gov/funding/Explore/CurrentFundingOpportunities.htm> (last visited Mar. 1, 2020).

115. *Id.*

116. *Office of Justice Programs*, OFF. OF JUST. PROGRAMS, <https://ojp.gov/index.htm> (last visited Mar. 1, 2020).

117. *Supra* Section II.

118. *Id.*

119. *Id.*

age of OJP funds to states until they implement the federally established minimum training and education requirements for carrying a concealed weapon.

In *Dole*, Justice Brennan voiced his dissent regarding generalized relationships between the grant and the program in which Congress was interested.¹²⁰ He stated that a uniform drinking age of twenty-one is not sufficiently related to safe interstate travel because it is both under- and over-inclusive.¹²¹ Brennan considered it over-inclusive because it stopped teenagers from drinking even if they were not going to drive on the highway and under-inclusive because teenagers only made up a small portion of drunk drivers.¹²² However, the majority still found that the central link, safety on highways, was enough to link the condition on the grant and the program Congress was promoting, i.e., a national minimum drinking age.¹²³ The CFETS Act has a stronger tie between the grant condition and the promoted program than the legislation discussed in *Dole*.

In every shooting scenario, law enforcement is involved. When a concealed-firearm carrier has an accidental discharge and shoots himself or someone else around him, officers have to investigate. Likewise, when a concealed-firearm carrier uses her gun defensively, officers have to secure the scene, write reports, and ensure that all interested parties are handled properly. In incidents like those involving Philando Castile and Jason Washington, law enforcement *is* an interested party.¹²⁴ In jurisdictions that issue CCW permits under a “May Issue” paradigm, the permits are granted by the CLEO of the area, often a sheriff or police chief, at the discretion of the officer. Therefore, law enforcement is directly involved with the process of a citizen carrying a concealed weapon.¹²⁵ The CFETS Act also requires that law enforcement officers themselves teach the established education and training program to applicants for concealed carry, intertwining law enforcement’s involvement with concealed carry even more.

This means that the CFETS Act avoids much of Justice Brennan’s criticisms. Law enforcement officers are often impacted by citizens legally carrying concealed weapons and are usually a part of the concealed carry process. Whereas the *Dole* Court related funds used to maintain highways with intoxicated, underage teenagers driving on those highways simply because the funds promoted safety on the highway,¹²⁶ the proposed legislation’s relationship between law enforcement grants and being a well-

120. *South Dakota v. Dole*, 483 U.S. 203, 214–25 (1987).

121. *Id.* at 214.

122. *Id.* at 214–15.

123. *Id.* at 208–09.

124. Pincus, *supra* note 55; Fink, *supra* note 57.

125. Nicholas Duva, *Gun Laws Vary State by State: CNBC Explains*, CNBC (Nov. 20, 2014, 8:47 AM), <https://www.cnbc.com/2014/11/20/gun-laws-vary-state-by-state-cnbc-explains.html>.

126. *Dole*, 483 U.S. at 208–09.

informed concealed-firearm carrier is much stronger. The proposed legislation passes the third element of the *Dole* test.

4. *The Proposal Is Not Coercive Because It Does Not Limit Funding Unreasonably*

Congress may not use its spending power to coerce states into participating in a particular federal program.¹²⁷ In *Dole*, the proposed limitation on federal grants for highways was 5 percent of available funds.¹²⁸ The Court ruled that this was far from coercive given the ability to find funds another way and the small percentage of the restriction.¹²⁹ Therefore, the question of what is coercive is one of judgment and impact. In the proposed legislation, the restricted funding is minimal enough that states have a “legitimate choice”¹³⁰ as to whether they will introduce the proposed legislation or not.

Using the OJP grants for grant restriction, the CFETS Act is structured to be far from coercive. In 2019, the OJP requested a budget of \$1.455 billion in discretionary funding and \$2.421 billion in mandatory funding for a total of \$3.876 billion.¹³¹ Both the discretionary and mandatory funds distribute money to state and local police forces to fund local OJP programs.¹³² While this number seems large, several police budgets for single cities can range from \$40 million up to \$5 billion.¹³³ Likewise, restricting funds for programs that the OJP supports will not cripple the primary operations for police departments. That said, the impact of losing those funds will still be felt by police departments in developing their annual operating budgets.¹³⁴ Because of this, the question of exactly what percentage of OJP funds should be restricted is difficult to answer.

A possible safe-harbor option is to follow the example set in *Dole* and only restrict 5 percent of the available federal grants to noncompliant states.¹³⁵ However, given that the funds restricted in *Dole* were less than

127. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–87 (1937).

128. *Dole*, 483 U.S. at 211. Today, however, the restriction on funding is 10 percent of available funds to states. 23 U.S.C. § 158 (2012).

129. *Dole*, 483 U.S. at 211.

130. *New York v. United States*, 505 U.S. 144, 185 (1992).

131. OFF. OF JUST. PROGRAMS, 2019 Budget Summary 1, <https://www.justice.gov/jmd/page/file/1033166/download> (last visited Apr. 12, 2019).

132. *Id.*

133. CITY OF SIOUX FALLS, 2019 CITY OF SIOUX FALLS BUDGET 1, <https://www.siouxfalls.org/finance/budget> (last visited Mar. 1, 2020) (click on “2019 City of Sioux Falls Budget” link to download the report); THE COUNCIL OF THE CITY OF NEW YORK, REPORT OF THE FINANCE DIVISION ON THE FISCAL 2019 PRELIMINARY BUDGET AND THE FISCAL 2018 PRELIMINARY MAYOR’S MANAGEMENT REPORT FOR THE NEW YORK POLICE DEPARTMENT 2 (Mar. 12, 2018) (available at <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2018/03/FY19-New-York-Police-Department.pdf>).

134. CITY OF SIOUX FALLS, *supra* note 133, at 2; *COPS*, *COPS*, <https://cops.usdoj.gov/> (last visited Mar. 1, 2020).

135. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

\$800 million,¹³⁶ compared to the OJP's \$3.876 billion, it may be prudent to limit the restriction of OJP grants to less than a 5 percent restriction. To try to comply with both safe-harbor options, the CFETS Act restricts up to 1.5 percent of OJP funds. This creates a grant limitation similar in size to the National Minimum Drinking Age Act of 1984. However, without a bright-line rule of what is and is not coercive, the primary guidance for setting a percent limit should be whether "the enactment of [the CFETS Act] remains the prerogative of the States not merely in theory but in fact."¹³⁷ This is an attainable standard to reach and, with proper congressional debate about the CFETS Act's restrictions, should not be a preventing factor on using conditional grant funding to push a federally-established minimum training and education requirement.

5. *The Proposed Training and Education Requirements Are Not Themselves Unconstitutional Because They Are Allowable under the Second Amendment*

The final requirement to using conditional grant funding to incentivize states to enact legislation is that the legislation promoted cannot in itself be unconstitutional.¹³⁸ The core of the CFETS Act is for states to enact mandatory federally established minimum training and education requirements for their citizens who wish to carry concealed firearms. This core legislation places a restriction on when and how citizens could carry firearms, and thus implicates the Second Amendment of the US Constitution. The analysis of why placing training and education requirements on concealed carry is not unconstitutional under the Second Amendment is significant and will be discussed in the next section.

IV. THE CFETS ACT IS SUPPORTED BY THE TEXT
OF THE SECOND AMENDMENT

The proposed legislation must be constitutionally permissible in itself to use conditional grant funding.¹³⁹ Because the CFETS Act places limitations on firearm use, the primary concern for constitutionality is whether it violates Second Amendment protections. The Second Amendment states, "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹⁴⁰ Historically, there has been debate about whether the Second Amendment applies to personal ownership of a firearm by citizens or to the idea of having

136. Act to Amend the Surface Transportation Assistance Act of 1978, Pub. L. No. 97-134, 95 Stat. 1699.

137. *Dole*, 483 U.S. at 211-12.

138. *Id.* at 208.

139. *Id.*

140. U.S. CONST. amend. II.

an actual organized militia.¹⁴¹ However, the US Supreme Court in *District of Columbia v. Heller* held definitively that the Second Amendment guarantees individuals the “right to possess and carry weapons in case of confrontation.”¹⁴² This “individual right” was then held to be incorporated into the states via the Fourteenth Amendment, which means states and the federal government have the same minimal level of protections for individuals who wish to own a firearm.¹⁴³

However, this individual right under the Second Amendment is not unlimited; both *Heller* and *McDonald v. City of Chicago* stated that *Heller* did not “cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”¹⁴⁴ The Supreme Court noted that these “longstanding prohibitions” were presumptively lawful, and thus do not violate the Second Amendment protections.¹⁴⁵ However, the Supreme Court did not establish a standard of review or delineation of what constitutes a “longstanding prohibition” or what would violate the Second Amendment.¹⁴⁶ Given that the list the Supreme Court gave on “longstanding prohibitions” is not exhaustive,¹⁴⁷ the lower courts have had to develop their own two-part test to determine what legislation violates the Second Amendment.¹⁴⁸ The CFETS Act passes this two-part constitutionality test. Moreover, based on the historical foundation of the Second Amendment and the Supreme Court’s interpretation in *Heller*, the CFETS Act has unique textual support from the Second Amendment, increasing its constitutionality.¹⁴⁹

141. *D.C. v. Heller*, 544 U.S. 570, 592–95 (2008).

142. *Id.* at 592.

143. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

144. *Heller*, 554 U.S. at 626–27; *McDonald*, 561 U.S. at 786 (citing *Heller*, 544 U.S. at 626–27).

145. *Heller v. D.C.*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

146. The Court cites in the majority opinion that the contested legislation, D.C.’s general prohibition on possession of a handgun, fails all three standards of review—rational basis, intermediate scrutiny, and strict scrutiny. *Heller*, 554 U.S. at 628–29. However, the Court does explicitly reject the idea of using the “rational basis” standard of review in the opinion’s footnotes. *Id.* at 628–29 n.27.

147. *Heller*, 554 U.S. at 627 n.26.

148. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, CIVIL RIGHTS LEGISLATION & LITIGATION § 1:10.50. CONSTITUTIONAL VIOLATIONS—SECOND AMENDMENT RIGHT TO BEAR ARMS (2019).

149. See *infra* Section IV, Part B.

A. *The CFETS Act Passes Each Part of the Two-Part Second Amendment Constitutionality Test*

The lower courts use a two-step test to determine whether an act improperly encroaches on Second Amendment protections.¹⁵⁰ If the statute imposes a restriction that can be considered a “longstanding prohibition,” meaning a type of restriction that existed when either the Second Amendment or the Fourteenth Amendment was passed, then the statute will be considered “presumptively lawful.”¹⁵¹ These “presumptively lawful” restrictions are presumed to be outside of the core protections of the Second Amendment and thus constitutional.¹⁵²

If, however, the statute in question does not have the historical pedigree to be considered a “longstanding prohibition,” the lower courts have applied a means-end scrutiny to determine whether the legislation violates the Second Amendment.¹⁵³ Generally, the applied level of scrutiny test has been intermediate scrutiny.¹⁵⁴ Intermediate scrutiny requires that the government “show, first, that it ‘promotes a substantial governmental interest that would be achieved less effectively absent the regulation,’ and second, that ‘the means chosen are not substantially broader than necessary to achieve that interest.’”¹⁵⁵ The CFETS Act passes both steps of the two-step test independently.

1. *The CFETS Act Affects “Longstanding Prohibitions” and Does Not Restrict the Core Protections of the Second Amendment*

The first step in the two-step analysis of a Second Amendment claim is “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”¹⁵⁶ The Supreme Court in *Heller* noted that it did not intend to place doubt on “longstanding prohibitions” with its decision that individuals have the right to personal firearms.¹⁵⁷ Based on this assertion, the court in *United States v. Marzzarella* adopted the interpretation that “presumptively lawful” restrictions fall

150. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); see also *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller*, 670 F.3d at 1252; *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010).

151. *Chester*, 628 F.3d at 680.

152. *Heller v. D.C.*, 801 F.3d 264, 273 (D.C. Cir. 2015) (citing *Heller*, 670 F.3d at 1254–55).

153. *Bodensteiner & Levinson*, *supra* note 148.

154. *Id.*

155. *Heller*, 801 F.3d at 295–97 (citing *Heller*, 670 F.3d at 1254–55 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989))).

156. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

157. *D.C. v. Heller*, 554 U.S. 570, 626–27 (2008).

outside the scope of the Second Amendment and are an exception to the right to bear arms.¹⁵⁸ While the Court in *Heller* lists several “presumptively lawful” restrictions,¹⁵⁹ any restriction outside of the list must undergo historical analysis. Because the Court in *Heller* stated that the Second Amendment simply codified a preexisting right to bear arms, it also codified the preratification understanding of the right to bear arms as well.¹⁶⁰ This means that the historical analysis must determine whether the restriction being imposed by the challenged statute is one that existed and was acceptable at the time when either the Second Amendment or Fourteenth Amendment was adopted. If so, then it is understood to exist outside the core protections of the Second Amendment and does not violate the Second Amendment’s protections.¹⁶¹

Under this paradigm, many lower courts have stated that carrying a concealed firearm is not protected by the Second Amendment.¹⁶² The right to carry a concealed weapon is one that has historically been restricted, both prior to the establishment of the United States and the Second and Fourteenth Amendments and after their codification. Dating back to 1299, there have been restrictions in England on carrying weapons without license in certain locations or at certain times of day.¹⁶³ These English laws continued to evolve, with King James I issuing bans on concealed weapons in 1613 and the Statute of Northampton of 1694 granting legal power to arrest those carrying concealed armor or weapons on their person.¹⁶⁴ These laws shaped the English Bill of Rights’ possible disallowance for concealed weapons, which in turn provided the foundation for America’s Bill of Rights and the Second Amendment.¹⁶⁵ As the *Peruta* court stated, “Thus, by the end of the eighteenth century, when our Second Amendment was adopted, English law had for centuries consistently prohibited carrying concealed (and occasionally the even broader category of concealable) arms in public.”¹⁶⁶ Likewise, America’s own localized laws had restrictions on concealed weapons prior to the adoption of the Second Amendment,¹⁶⁷ again establishing that concealed carry restrictions were understood to be allowable under the Second

158. *Marzzarella*, 614 F.3d at 91.

159. *Heller*, 554 U.S. at 626–27.

160. *Marzzarella*, 614 F.3d at 91.

161. *United States v. Greeno*, 679 F.3d 510, 518–19 (6th Cir. 2012).

162. *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012). Also, the court in *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013), states that concealed carry applications that require demonstrating a “justifiable need” fall within presumptively lawful regulations. The court does not expound on its analysis of why restrictions on concealed carry application and permit granting are presumptively lawful, but the statements show that the 3rd District is a jurisdiction where restrictions on concealed carry and concealed carry permits are likely constitutional.

163. *Peruta*, 824 F.3d at 930–31.

164. *Id.* at 931–32.

165. *Id.* at 932.

166. *Id.*

167. *Id.* at 933.

Amendment. In the time between adoption of the Second Amendment and the Fourteenth Amendment, state courts almost unanimously ruled that concealed carry was outside the protection of the Second Amendment.¹⁶⁸ Based on the extensive and consistent history of permitted restrictions and bans on carrying concealed weapons, both leading up to and at the time of adoption of the Second and Fourteenth Amendments, the *Peruta* court echoed the holding of its sister courts in the second, third, fourth, and tenth districts: “We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”¹⁶⁹ All of this supports the language used in *Heller* as well:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g., Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. *For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.*¹⁷⁰

Between the historical analysis done by the district courts, and the specific language used by the Supreme Court in *Heller*, the evidence points toward restrictions on carrying a concealed firearm being presumptively lawful and thus outside of the scope of the core of the Second Amendment.

Furthermore, these holdings that allow restrictions on concealed carry all stem from more restrictive statutes than the CFETS Act.¹⁷¹ Unlike a statute that requires an applicant to show “good cause” to be allowed to carry a concealed weapon, applicants under the CFETS Act are required to

In 1686, the New Jersey legislature, concerned about the “great abuses” suffered by “several people in the Province” from persons carrying weapons in public, passed a statute providing that “no person or persons . . . shall presume privately to wear any pocket pistol, skeins, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province.”

Id. (citing An Act Against Wearing Swords, Etc., 1689 N.J. Laws 289, ch. 9).

168. *Id.* at 939.

169. *Peruta*, 824 F.3d at 939. The sister court cases cited in *Peruta* as supporting the court’s holding are: *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

170. *D.C. v. Heller*, 554 U.S. 570, 626 (2008) (emphasis added).

171. The court in *Peruta* held that California law can require an applicant for concealed carry to show “good cause” and, in fact, found that there is *no* Second Amendment right in carrying a concealed firearm. *Peruta*, 824 F.3d at 924, 942. The court in *Kachalsky* held that requiring “proper cause” to carry a firearm did not violate intermediate scrutiny. *Kachalsky*, 701 F.3d at 100–01. “Proper Cause,” or “Justifiable Need,” requires that permit applicants demonstrate they have a good reason to carry a concealed firearm, and if in the eyes of the granting authority they do not, then they do not receive their permit to carry a concealed weapon. See generally *Kachalsky*, 701 F.3d at 81.

take only the minimum training necessary to ensure they are properly prepared for defensive gun use. The DC Circuit Court considered the size of the Second Amendment burden when it developed its *de minimis* test for Second Amendment challenges: if the challenged statute creates a burden that is *de minimis*, meaning it has minimal burden on the citizen's rights, then it does not implicate the Second Amendment right.¹⁷² The district courts have ruled that concealed carry restrictions are fully constitutional, even when deciding on far more restrictive statutes; considering how little the overall burden is from the CFETS Act—adding only a small training and education requirement for citizens carrying concealed firearms—it is likely *de minimis* and thus constitutional.

Therefore, while the CFETS Act places a restriction on citizens hoping to carry concealed firearms, the act will likely not be considered unconstitutional. The history of concealed carry cases in the district courts supports this conclusion. Furthermore, the very language of the Supreme Court in *Heller* also supports this conclusion. Finally, the restriction being placed would likely be considered *de minimis*, at least in the DC Circuit Court. Thus, the CFETS Act is likely constitutional and passes the constitutionality requirement of the *Dole* test.

2. *The CFETS Act Passes Intermediate Scrutiny and Is Constitutional under the Second Amendment*

Even if the CFETS Act does not pass the first step of the two-step Second Amendment test, the second step is to apply a means-end scrutiny to assess whether the statute is constitutional.¹⁷³ Generally, the scrutiny test applied is intermediate scrutiny, though there are some jurisdictions that apply a “substantial relationship” test, and others that simply look at the burden the statute puts on the core right of self-defense.¹⁷⁴ Regardless of the test or scrutiny applied, the CFETS Act passes the second step of the two-step test created in *Heller*.

The CFETS Act passes the most commonly used test for Second Amendment constitutionality: intermediate scrutiny. The *Heller* court specifically rejected rational-basis scrutiny but refused to specify which level of scrutiny or what test should be used instead.¹⁷⁵ However, many of the lower courts took the language used in the *Heller* opinion and determined that, unless the challenged statute significantly burdens a citizen's right to defend herself, the proper scrutiny to be applied is intermediate scrutiny.¹⁷⁶ Because the CFETS Act is an optional regulation that states can either opt

172. *Heller v. D.C.*, 801 F.3d 264, 274 (D.C. Cir. 2015).

173. Bodensteiner & Levinson, *supra* note 148.

174. *Id.*

175. *Heller*, 554 U.S. at 628–29 n.27.

176. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016); *see also Heller v. D.C.*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

in to or out of, it can have little to no burden on some citizens. Likewise, the CFETS Act does not reduce the number of citizens who could carry a concealed weapon but simply asks that they complete a comprehensive training course before carrying a concealed firearm.¹⁷⁷ Furthermore, the act does not impact the open carrying of firearms or firearm ownership in the home.¹⁷⁸ Therefore, the CFETS Act imposes only a modest burden on citizens looking to carry concealed firearms, so it would likely be reviewed under intermediate scrutiny.

“To pass muster under intermediate scrutiny the district must show [the requirements of the statute] are ‘substantially related to an important governmental objective.’”¹⁷⁹ The statute must provide a tight fit between the restriction imposed and an important or substantial government interest. A tight fit is one “that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”¹⁸⁰ So long as the statute furthers a substantial governmental interest more effectively than if the statute did not exist, and the statute is not unnecessarily broad, the statute will pass constitutional muster.¹⁸¹

The first step to passing intermediate scrutiny is to show that “the government’s stated objective . . . be significant, substantial, or important.”¹⁸² In this case, the objective of the CFETS Act, as stated in Section III, is to promote public safety by implementing the objectives of the OJP—creation of safe, just, and engaged communities. The act accomplishes this by reducing the risk of gun-related injury and death, promoting safe firearm practices, and educating individuals on their legal obligations while carrying concealed firearms. These objectives also align with current precedent. While the Supreme Court has not ruled on a case regarding public safety, firearms, and intermediate scrutiny, several of the circuit courts have.¹⁸³ The Ninth Circuit Court of Appeals solidified a substantial government interest in public safety regarding firearms in *Bauer v. Becerra*, stating, “[i]t is self-evident’ that public safety is an important government interest, and

177. See *infra* Appendix A, *Citizen’s Firearm Education and Training Safety Act*, Section E(1) (2019).

178. Open Carry is the term used for a person carrying a firearm that is visible to the public. Some states have different requirements for open carry versus concealed carry, and the two are usually considered legally separate actions. Sara Ahrens, *Concealed Carry vs. Open Carry*, RANGE365 (Oct. 7, 2016), <https://www.range365.com/concealed-carry-vs-open-carry>.

179. *Heller*, 670 F.3d at 1258 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

180. *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

181. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

182. *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013).

183. *Bauer v. Becerra*, 858 F.3d 1216, 1224 (9th Cir. 2017); *Kwong v. Bloomberg*, 723 F.3d 160, 168–69 (2d Cir. 2013); *Nat’l Rifle Ass’n of Am. v. McCraw*, 719 F.3d 338, 349 (5th Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 872–73 (4th Cir. 2013); *Heller v. D.C.*, 801 F.3d 264, 298 (D.C. Cir. 2015).

reducing ‘gun-related injury and death’ promotes public safety.”¹⁸⁴ Because the CFETS Act promotes public safety, legal education, and saving lives, it will likely pass the “substantial governmental interest” portion of intermediate scrutiny.

The second step to passing intermediate scrutiny is to show that there is “a reasonable fit between the challenged regulation and the asserted objective.”¹⁸⁵ It does not require “the least restrictive means of furthering a given end,”¹⁸⁶ or that “there is no burden whatsoever on the individual right in question.”¹⁸⁷ It requires only reasonably narrow tailoring. The CFETS Act achieves this reasonable fit; it increases public safety and decreases avoidable death but does not overburden society or the individual.

The CFETS Act is far from overbroad. The act affects only a small portion of gun owners but is effective in promoting its stated objectives. Civilian-police interactions, accidental shootings, illegitimate DGUs, and improper pre- and post-DGU responses are all issues that the CFETS Act mitigates and solves. It is difficult to argue that increasing education about firearm tactics, self-defense law, and appropriate emergency responses for citizens carrying concealed weapons would not promote public safety and reduce the harms discussed in Section II. Likewise, the act affects only the population most likely to be impacted by the harms discussed in Section II. Citizens who keep firearms only in the home are outside the scope of the proposed legislation, as are those who hunt, target shoot, or participate in target-shooting sports. It could even be argued that the CFETS Act should be broader and require training for citizens who open carry. Regardless, the proposed legislation is far from overbroad and impacts only the citizens necessary to further its goal for public safety. Thus, there is “a reasonable fit between the challenged regulation and the asserted objective.”¹⁸⁸ Because most Second Amendment claims are reviewed under intermediate scrutiny, and because the CFETS Act passes both parts of the intermediate scrutiny test, the law will be considered constitutional. Therefore, it passes the constitutionality requirement of the *Dole* test.

B. The CFETS Act Promotes the Textual Meaning of the Second Amendment

While the CFETS Act passes both steps in the two-step test for Second Amendment constitutionality, it also holds a unique position that bolsters its constitutionality. When the Supreme Court in *Heller* deconstructed the text of the Second Amendment in its opinion, it noted that the phrase “well-

184. *Bauer*, 858 F.3d at 1223, (quoting *Jackson v. City and Cty. of S.F.*, 746 F.3d 953, 965 (9th Cir. 2014) (quotations omitted)).

185. *Chovan*, 735 F.3d at 1139.

186. *Bauer*, 858 F.3d at 1223.

187. *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017).

188. *Chovan*, 735 F.3d at 1139.

regulated” as used in the Second Amendment implies the “imposition of proper discipline and training.”¹⁸⁹ The Court in *Heller* gives the phrase “well-regulated” little more thought than that, but the statement has a significant effect on the proposed legislation. By having the phrase “well-regulated” mean “disciplined and trained,” the actual text and meaning of the Second Amendment imposes a training requirement on citizens, the very action the CFETS Act proposes.

This imposition is historically supported as well. The Supreme Court cites William Rawle’s writings as demonstrating that the “well-regulated” phrase in the Second Amendment means “trained to arms.”¹⁹⁰ Prior to and during the creation of the US Constitution, several colonies included the phrase “trained to arms” in their own iterations of the Second Amendment.¹⁹¹ Even English law, the foundation of America’s Constitution, had supporters for proper training. Stephen Halbrook discusses the history prior to the Second Amendment in *That Every Man Be Armed* and cites James Burgh, an influential Whig.¹⁹² Burgh wrote:

Nothing will make a nation so unconquerable as a militia, or every man’s being trained to arms. . . . And if the generality of housekeepers were only half-disciplined, a designing prince, or ministry, would hardly dare to provoke the people by an open attack on their liberties. . . . But without the people’s having some knowledge of arms, I see not what is to secure them against slavery¹⁹³

As Halbrook notes, to the historical writers like Rawle, “[t]he militia was not a government organization but a people with arms and with knowledge of how to use them.”¹⁹⁴

Considering the direct language of the Supreme Court in *Heller* and the historical support for the Court’s assertion that “well-regulated” means well-trained, the actual text and meaning of the Second Amendment uniquely supports the CFETS Act. If, as the Court stated in *Heller*, the text of the Second Amendment creates an “imposition of proper discipline and training,”¹⁹⁵ then the CFETS Act is not only constitutional but has the unique privilege of *furthering* a denoted constitutional right. Since permitless carry states allow citizens to carry firearms without any educa-

189. *D.C. v. Heller*, 554 U.S. 570, 597 (2008).

190. *Id.*; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121–22 (1829).

191. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (Univ. of N.M. Press rev. ed. 2013) (1984).

192. The Whigs were a political faction in England who “opposed royal absolutism . . . supported the rights of parliament, and wanted to limit royal power.” ROBERT LEACH, POLITICAL IDEOLOGY IN BRITAIN 28 (3d ed. 2015).

193. RAWLE, *supra* note 190, at 55 (citing JAMES BURGH, POLITICAL DISQUISITIONS 399–401 (1774)).

194. HALBROOK, *supra* note 191, at 55.

195. *D.C. v. Heller*, 554 U.S. 570, 597 (2008).

tion or training, the CFETS Act will bring those states into alignment with the textual meaning of the Second Amendment: the right of citizens, trained in firearms, to have firearms for self-defense. Because of this unique position, the CFETS Act is constitutional and passes the constitutionality requirement of the *Dole* test.

V. THE ARGUMENTS AGAINST A FEDERALLY ESTABLISHED MINIMUM EDUCATION AND TRAINING REQUIREMENT

Regardless of Congress's constitutional ability to pass the CFETS Act, there will almost certainly be opposition to the act's passage. Opponents of the CFETS Act may point to several policy arguments against requiring a minimum education and training requirement. The primary arguments that may be put forward are that the CFETS Act places a financial burden on states to provide training, that the act places unnecessary restrictions on citizens wanting to defend themselves, and that the act is a step toward more firearm regulations. Each of these arguments is rebutted below, and, on balance, the CFETS Act will be beneficial to the American public.

A. *Placing the Cost of Training and Education on the States Does Not Create an Unnecessary Financial Burden*

The CFETS Act is structured so that active law enforcement officers are tasked with leading the required training and education programs for those who wish to carry a concealed weapon. Unlike the current situation, where private institutions can hire private certified firearms instructors, the act requires that all concealed carry training be done by active officers who have completed the federally established instructor certification program. Having active officers train the public not only ensures that qualified individuals are instructors but also bridges the gap between law enforcement and citizens. Citizens will be exposed to officers in a relaxed, structured environment, and officers will have the chance to teach people who wish to carry concealed firearms how to do so legally and responsibly. This structure reduces the anxiety mentioned in Section II, when officers encounter someone carrying a concealed firearm lawfully, and will help reduce injuries and death. Likewise, citizens will hear just how important it is that they act in prescribed manners when interacting with law enforcement while carrying firearms. There are benefits on both sides.

However, there are costs associated with training. Departments will need staff to train citizens, which may require overtime, reallocation of hours, or hiring. These options cost money, and the argument may be made that placing the burden on already strained police departments will impact law enforcement. However, this problem can be eliminated. First, under the CFETS Act, participating states can apply for additional funding to offset the financial burden of leading trainings. The grants can be distributed as

the states see fit but will go exclusively toward firearm education and training costs. Second, just as citizens often pay CCW permit training and education fees now, the states can set up their own fee payment structure. Since the act will functionally remove private CCW permit training courses, the fees citizens pay to those courses now can simply be paid to the state directly. The states and localities can also increase taxes or reallocate their own budgets. It is important that law enforcement in participating states do not feel a financial impact by passing the CFETS Act; if the incentive for states to adopt the CFETS Act is a decrease in the state's budget by withholding federal funds, then the outcome for those that *do* adopt the CFETS Act cannot be increased financial strain from new training costs. What could kill the CFETS Act is a situation in which law enforcement and states are doomed if they do, doomed if they don't. However, under the language of the legislation and the individual state's ability to levy fees for training, law enforcement budgets should not be heavily impacted.¹⁹⁶

B. The CFETS Act Does Not Put an Unnecessary Restriction on Those Wanting to Protect Themselves

While the CFETS Act passes constitutional muster, opponents of the CFETS Act may still view it as an unnecessary restriction on citizens' ability to carry concealed weapons.¹⁹⁷ Ten hours of education and training, application times and fees, and fresh restrictions on concealed carry in permitless carry states may all be viewed as unnecessary hoops to jump through.¹⁹⁸ Considering the NRA has supported the trend towards permitless states,¹⁹⁹ reimplementing training and education requirements in those states may be seen as a barrier to citizens defending themselves. However, there are several issues with this strain of arguments. The CFETS Act is not a barrier to self-defense but an act that promotes and enables safe, competent self-defense.

Setting aside the importance of knowing when it is legal and ethical to use a firearm in a DGU, for proper self-defense, citizens need to understand how to actually operate their firearms. In constitutional carry states, citizens can carry concealed firearms without ever having fired them. Some have never been formally trained on the basics of marksmanship, much less high-stress defensive encounters. Even in states with concealed carry classes, the

196. See *infra* Appendix A, *Citizen's Firearm Education and Training Safety Act*, Sections C, D (2019).

197. The NRA labels itself as "Freedom's Safest Place" and has the following language on its site: "In the face of gun-hating political elites, a dishonest media and radical billionaires who want to fundamentally change America and restrict our Second Amendment freedoms, our only choice is to fight." *NRA Speaks for Me*, NRA, <https://www.nraspeaksforme.com> (last visited Mar. 1, 2020).

198. See *infra* Appendix A, *Citizen's Firearm Education and Training Safety Act*, Section E (2019).

199. Gstalter, *supra* note 4; Gruber-Miller, *supra* note 4.

marksman training can be insufficient to train citizens.²⁰⁰ Inefficient firearms training leads to firearm malfunctions, strayed shots, and poor response times, all of which prevent citizens from successfully defending themselves. The CFETS Act mitigates these dangers by properly training *all* citizens who want to carry concealed firearms. Given that the NRA emphasizes the importance of training on its site,²⁰¹ and has a history of promoting and leading its own established training programs,²⁰² there can be little debate about the importance and difference proper firearm training can have in effective self-defense. The CFETS Act removes one of the greatest barriers to proper self-defense: incompetence.

In addition, the act affects only those who carry concealed weapons in public. Firearm use and ownership in the home are unaffected, as is open carry. Those who wish to defend themselves in their own homes, away from the crowds and risk of endangering the public, are exempt from the requirements of the act. The narrowness of the act unfortunately reduces its effectiveness in curbing improper firearm use and care, but it does create a balance between improving public safety and upholding an individual's rights in her home.

Finally, the CFETS Act is an optional regulation. Since the conditional grant structure used in the CFETS Act is not coercive,²⁰³ each state can determine whether it will opt in to the mandatory training and education requirements. The law places training and education requirements on only states that pass the necessary legislation to receive the grants; any state can decide to forgo the grants and continue with the status quo. In either case, the state legislatures and their constituents will determine whether the CFETS Act impacts them or not. Those who believe the CFETS Act unnecessarily impacts their right to self-defense can voice their opinion to their legislature before any regulations are adopted in their state.

C. *Passing the Proposed Legislation Will Not Lead to Increased Firearm Regulations*

Because the CFETS Act imposes federal firearm restrictions, there may be concern that it will open the gates for more federal level firearms regulations, such as the creation of a national firearm registry.²⁰⁴ However, the CFETS Act is predominantly a state-controlled program. While the min-

200. Tom McHale, *8 Reasons You Need Real Firearms Training*, BERETTA BLOG (Mar. 7, 2019, 12:13 PM), <http://blog.beretta.com/8-reasons-you-need-firearms-training>.

201. See *A Brief History of the NRA*, NRA, <https://home.nra.org/about-the-nra> (last visited Mar. 1, 2020).

202. *Id.*; *NRA Firearm Training*, NRA, <https://firearmtraining.nra.org> (last visited Mar. 1, 2020).

203. See *supra* Section III, Part (B)(4).

204. *Gun Registration | Gun Licensing*, NRA-ILA (Aug. 8, 2016), <https://www.nraila.org/get-the-facts/registration-licensing>. At the time of this essay, current presidential candidate Cory Booker has announced his plans for a national gun registry. Emily Larsen, *Cory Booker Plans*

imum requirements for training and education are established by the federal government, states can choose to opt in or out of the regulations. Unlike many of the federal firearms restrictions that concern Second Amendment advocates, the CFETS Act is not a widespread restriction or outright requirement; there is flexibility in the states. Because the implementation and execution of the restriction is predominantly state-controlled instead of federally controlled, the act is unique among federal firearms laws.

If there is one federal law that might pass in response to the CFETS Act, it is national reciprocity. National reciprocity is a program where each state recognizes and enforces the concealed carry laws of every other state.²⁰⁵ For example, a concealed carry permit issued in Minnesota will be recognized and honored in all other forty-nine states. Currently, a system of state-run reciprocity exists in the United States, with the average state recognizing permits from more than thirty other states.²⁰⁶ However, it is up to the discretion of the states to determine to whom they will grant reciprocity. No national reciprocity program exists now, but there is pending legislation proposing a national reciprocity system, supported by the NRA and other firearm advocates.²⁰⁷ However, the major issue with the current national reciprocity proposal is that it creates a system where states with high training requirements have to recognize concealed carry permits from states with functionally no training requirements.²⁰⁸ The bill diminishes education and training requirements for concealed carry by forcing states with strong training and education to honor permits from states with weak training and education. As Hannah Shearer points out, under H.R. 38, states with strong laws, like California, would be forced to allow residents of permitless carry states to carry their concealed guns in California with no training requirements or background checks. They would also be required to recognize all valid concealed carry permits issued by another state, including those that do little or nothing to restrict the carrying of concealed firearms by untrained people or people who cannot pass a background check. In some cases, this means states would have to recognize permits issued to *their own residents* by another state that offers permits to nonresidents.²⁰⁹

The CFETS Act solves this issue. By creating a system where every state has the same training and education requirements, the concern over

National Gun Registry, WASH. EXAMINER (May 6, 2019), <https://www.washingtonexaminer.com/news/cory-booker-plans-national-gun-registry>.

205. Hannah E. Shearer, *Jeopardizing "Their Communities, Their Safety, and Their Lives": Forced Concealed Carry Reciprocity's Threat to Federalism*, 45 HASTINGS CONST. L.Q. 429 (2018).

206. Brandon Mosely, *Mike Rogers Cosponsors Concealed Carry Reciprocity Act*, ALA. POLITICAL REPORTER (Jan. 30, 2019), <https://www.alreporter.com/2019/01/30/mike-rogers-cosponsors-concealed-carry-reciprocity-act>.

207. Shearer, *supra* note 205, at 431–33; H.R. 38, 116th Cong. (2019).

208. Shearer, *supra* note 205, at 431–33.

209. *Id.*

more restrictive and less restrictive training requirements disappears. States that opt in to the CFETS Act regulations will be more likely to grant reciprocity to fellow CFETS Act-compliant states, and if all fifty states opt in, it will remove a major barrier from national reciprocity legislation. This should act as a strong incentive for Second Amendment proponents to back the CFETS Act, as the only legislation it lays the foundation for is legislation that they want passed.

VI. CONCLUSION

As the number of citizens carrying concealed firearms increases, the importance of proper firearm training and education also increases. Proper training and education ensure that citizens know how to handle and store their firearms. They also ensure that citizens properly use their firearms for self-defense and teaches citizens how to respond during and after a self-defense shooting. They can also reduce the number of incidents between citizens who are legally carrying firearms and law enforcement. A growing number of states do not require any education or training for their citizens to carry concealed weapons. Even in states that do require training and education, the requirements are often vague, and the CCW course experience is not uniform.

To combat these issues, Congress should pass the CFETS Act. Because the act uses conditional grant spending, and because the act does not violate the Second Amendment, it is a constitutional exercise of congressional power. Furthermore, the act's scope and benefits far outweigh any possible inconveniences to citizens. By incentivizing states to adopt a uniform minimum training and education requirement, the CFETS Act will improve public safety and ensure that citizens who carry concealed firearms are smarter, safer, and better prepared for what happens in a self-defense shooting.

APPENDIX A: PROPOSED LEGISLATION

Citizen's Firearm Education and Training Safety Act

(a) **Withholding of funds for noncompliance.**—The Secretary shall withhold one and one-half (1.5) percent of the amount of funding required to be apportioned to or requested from any State, granted from the Office of Justice Programs, on the first day of each fiscal year after the second fiscal year beginning after September 30, 2020, in which the carrying of a concealed firearm without completing the education and training requirements of section (e) is lawful.

(b) **Effects of withholding of funds.**—No funds withheld under this section from apportionment to any State after September 30, 2023, shall be available for apportionment to that State.

(c) States that pass legislation implementing the training and education standards from section (e) may apply for additional grant funding to reduce the financial cost of hosting training programs. The funds granted may be disbursed as the states see fit, but only for the purposes of alleviating the costs and reasonably related costs of running the concealed carry training and education programs.

(d) States that pass legislation implementing the training and education standards from section (e) may set up their own fee system for citizens who wish to carry concealed firearms. The fees currently paid to private organizations for CCW permit courses or similar certifications can instead be paid to law enforcement agencies who train and educate citizens pursuant to this Act.

(e) **Minimum Education and Training Requirements.**—States that wish to receive the funding otherwise withheld in section (a) must require that citizens who wish to carry concealed firearms complete the following minimum education and training requirements:

(1) Complete a minimum ten-hour course led by a Certified LEO Firearm Instructor, comprised of the following:

(A) Five hours of firearm safety, legal, and emergency response education. At minimum, the education must cover the following topics:

(i) The proper method of storing, handling, and caring for the citizen's concealed carry firearm;

(ii) The State's legal allowances for use of deadly force, including self-defense, and the restrictions on the use of deadly force;

(iii) State and Federal unlawful acts with a firearm under relevant state law and 18 U.S.C. § 922 respectively;

(iv) The best practices for interacting with law enforcement when carrying a concealed firearm;

(v) The best practices for avoiding interactions that require the use of a concealed firearm;

(vi) The best practices for emergency response and post-engagement conduct; and

(vii) The mental, legal, physical, and emotional outcome of engaging in a defensive gun use.

(B) Participants must pass an examination of their legal and ethical requirements to complete the training.

(C) Five hours of firearm training. The training must cover the following topics:

(i) Instruction on firearm safety at the range and at home;

(ii) Instruction in fundamentals of pistol use;

(iii) Instruction in the fundamentals of pistol cleaning, care, and maintenance;

(iv) Successful completion of a standard shooting qualification examination, as determined by best practices, which must include the following scenarios:

high-stress encounters and shooting
shooting behind obstacles and cover
firearm malfunction correction
timed shooting.

(f) Certification.—

(1) Generally.—Each individual who completes the education and training program shall be issued a certificate of completion by his or her resident state.

(A) Permit-Requiring States.—The certificate may be given to a CCW Issuer as proof of completion of the training and education requirement upon application for a State's CCW Permit or similar permit to carry a concealed weapon.

(B) Permitless States.—The certificate may be carried in states that do not require concealed carry permits. Law enforcement may not ask to see the training certificate unless they have probable cause to believe the individual carrying a firearm has not completed the mandatory training program.

(2) Renewal.—The training and education requirement must be completed by an individual wishing to carry a concealed firearm the lesser of either every five years or the expiration term of the citizen's oldest concealed carry permit still valid.

(A) If the individual lives in a permitless state and is not required to have a concealed carry permit, he or she must retake and pass the training and education requirements in that state every five years.

(B) If the individual lives in a permit-issuing state with a renewal period for his or her concealed carry permits of less than five years, he or she must retake and pass the training and education at each renewal period.

(C) If the individual has concealed carry permits in more than one state, the individual must retake and pass the training and education requirements in the lesser of every five years or the permit renewal term for the first state in which the individual received his or her concealed carry permit.

(g) Definitions.—

(1) “Firearm” defined.—As used in this section, the term “firearm” means—

(A) Firearm as defined in 18 U.S.C. § 926(e)(1).

(2) “Best Practices” defined.—As used in this section, “best practices” means—

(A) The practices, training, or standards set by an appointed committee comprising International Law Enforcement Educators and Trainers Association (ILEETA) members, other law enforcement, and industry experts on self-defense and firearm handling.

(i) The committee will be jointly appointed by the Committee Chairmen. The Committee Chairs will consist of the Executive Director of ILEETA, or his or her designee, and the Acting Deputy Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, or his or her designee. The committee will consist of the two Chairs and seven other appointees for a total of nine members.

(3) Certified LEO Firearm Instructor defined.—As used in this section, the term “Certified LEO Firearm Instructor means—

(A) An active Law Enforcement Officer (LEO) who has completed the federally-established instructor program, created using best practices.

(4) Concealed Carry Permit, or CCW, defined.—As used in this section, the interchangeable terms Concealed Carry Permit or CCW mean—

(A) A state-issued license to lawfully carry a concealed firearm.